1965

*June 8, 9
Nov. 9

GUARANTEE COMPANY OF NORTH AMERICA, PROVIDENCE WASHINGTON INSURANCE COMPANY, CANADA SECURITY ASSURANCE COMPANY, FEDERAL INSURANCE COMPANY, WESTERN ASSURANCE COMPANY, HOME INSURANCE COMPANY (*Defendants*) ... } APPELLANTS;

AND

AQUA-LAND EXPLORATION LIMITED (*Plaintiff*) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Insurance—Plaintiff company entering agreement under which new company to take delivery of drilling tower under construction—Loss of tower—Whether plaintiff company had insurable interest.

On April 29, 1957, the respondent company, the president of A Co. and the latter's associate executed an agreement under the terms of which a new company (M Ltd.) was to be incorporated for the purpose, *inter alia*, of taking delivery from A Co. of a drilling tower of a new type which had already been partially constructed by that company. The tower was to be delivered to M Ltd. to be its absolute property for and in consideration of the payment, on such delivery, by M Ltd. to A Co. of the sum of $39,200. Under the agreement the respondent was to subscribe for 39,200 preference shares of M Ltd. of a par value of $1 each. The president of A Co. and his associate were to transfer their interest in the patent rights for the tower to M Ltd. and in return were each to receive 19,600 preference shares. An advance of $30,000 toward the cost of building the tower was made by the respondent to A Co. on May 10, 1957.

The tower was a part of the property described in a policy of insurance taken out by the respondent on June 19, 1957. It was destroyed while being towed into place on July 25 before it had been delivered by A Co. to M Ltd. or to anyone else. The question raised was whether at the time when the insurance was effected and at the time of its destruction, the respondent had an insurable interest in the tower so as to entitle it to recover for the loss under the terms of the policy. The trial judge and the majority of the Court of Appeal found that the respondent had an insurable interest in the tower consisting of "a right derivable out of some contract about the property".

Held (Cartwright and Judson JJ. dissenting): The appeal should be allowed.

Per Martland J.: The respondent did not have any insurable interest in the tower but even assuming that it had, such interest would have been that of a buyer to whom neither risk nor property had passed. If this gave ground for any insurance to be validly effected by the assured, it would have been for insurance on that interest and not on the property. Consequently, even if an interest did exist in the respondent, it was not such an interest as was insured under the policy in question.

*PRESENT: Cartwright, Martland, Judson, Ritchie and Spence JJ.

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Per Martland and Ritchie JJ.: It was not shown that there existed, either at the time when the insurance was applied for or at the time of loss, such a contract between the respondent and A Co. in respect of the tower under construction as conferred on the respondent an interest in it which a court of law or equity would recognize and enforce.

The agreement of April 29, 1957, contained no reference to delivery of the tower to the respondent by A Co., nor was there any provision for payment by the respondent; the tower was to be delivered to M Ltd. and it was the company which was to pay the purchase price. The respondent held no interest in the patent for the tower design except in its capacity as a potential shareholder of M Ltd. The advance of $30,000 was not made in part performance of any contractual obligation of the respondent to A Co.; it was made on behalf of M Ltd. to be credited by that company against the respondent's obligation to pay for its shares of M Ltd.

The respondent in effect was seeking from its insurers the recoupment of the loss which it sustained when it did not receive back the $30,000. A loan not secured by a lien or charge on the insured property did not give rise to an insurable interest therein and even if the $30,000 received by A Co. were to be treated as a loan made by the respondent on its own behalf, it was in no way secured by any lien or charge on the tower.

Clark v. Scottish Imperial Insurance Co. (1879), 4 S.C.R. 192; *Macaura v. Northern Assurance Co. Ltd. et al.*, [1925] A.C. 619, referred to.

Per Spence J.: In the circumstances, the respondent's only interest in the tower was that of a shareholder in M Ltd., or an investor entitled to have issued to it shares for which it had paid in part, such payment having been used in part payment for the completion of the tower. Such a result would not give to the respondent the direct relationship to the property in the tower to constitute an insurable interest.

Per Cartwright and Judson JJ., *dissenting:* The question whether the respondent had a right derivable out of a contract about the tower which would be enforced by a court of equity could be tested by considering what the situation would have been if the tower had not been destroyed but A Co. had announced that it was going to deliver it to a stranger who had offered a better price. M Ltd. would have had no cause of action against A Co. for it was not a party to the contract with that company. The contractual situation was that the respondent (and others) had a contract with A Co. whereby the latter was bound to construct the tower and deliver it to M Ltd.; the consideration moving to A Co. was the sum of $39,200 and the respondent had paid $30,000 of this to A Co. The manner in which this payment was to be accounted for and dealt with as between the respondent and M Ltd. was irrelevant. The tower being a chattel which could not readily be replaced, equity, at the suit of the respondent, would grant specific performance and compel the delivery of the tower to M Ltd. Accordingly, the respondent had an insurable interest in the tower at all relevant times.

The defence that even if the respondent did have an insurable interest in the tower that interest was not adequately described in the policy was not open to the appellants. The issue to be tried was limited to the question whether the respondent had an insurable interest in the tower. If it had it was entitled to succeed, if it had not its action must fail.

APPEAL from a judgment of the Court of Appeal for Ontario[1], affirming a judgment of McRuer C.J.H.C. Appeal allowed, Cartwright and Judson JJ. dissenting.

W. B. Williston, Q.C., and *R. J. Rolls*, for the defendants, appellants.

J. J. Gray, for the plaintiff, respondent.

The judgment of Cartwright and Judson JJ. was delivered by

CARTWRIGHT J. (*dissenting*):—The relevant facts and the course of the proceedings in the Courts below are set out in the reasons of my brother Ritchie.

I have reached the conclusion that the appeal fails.

I am in substantial agreement with the reasons of McRuer C.J.H.C. and particularly with the summary of his views, concurred in by the majority in the Court of Appeal, which he expressed as follows:

> To summarize my views, without going beyond the special facts of this case I think the plaintiff had an insurable interest in the tower both at the time the contract of insurance was entered into and when the loss occurred because, (1) the construction of the tower was ordered by the plaintiff and Bodi and Bowland; (2) it was being constructed in the development of an invention in which the plaintiff had an interest under its contract with Bodi and Bowland; (3) the tower was for a specific purpose and as part of the drilling operations of the plaintiff; (4) the plaintiff had advanced $30,000 to further its construction; and (5) at the time the loss occurred there had been no corporate act on the part of Marine Drilling Towers Limited to affect the plaintiff's interest or its liability.
>
> If I am correct in these findings the plaintiff has "a right derivable out of (a) contract about the property."

In my opinion, the question whether the respondent had a right derivable out of a contract about the tower which would be enforced by a court of equity may be tested by considering what the situation would have been if the tower had not been destroyed but Accurate Machine and Tool Company Limited, hereinafter referred to as "Accurate", had announced that it was going to deliver it to a stranger who had offered a better price. It seems clear that Marine Drilling Towers Limited, hereinafter referred to as "Marine", would have had no cause of action against "Accurate" for it was not a party to the contract with that company. The contractual situation was that the respondent (and

[1] [1964] 2 O.R. 181, 44 D.L.R. (2d) 645.

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others) had a contract with "Accurate" whereby the latter was bound to construct the tower and deliver it to "Marine"; the consideration moving to "Accurate" was the sum of $39,200 and the respondent had paid $30,000 of this to "Accurate". The manner in which this payment was to be accounted for and dealt with as between the respondent and "Marine" appears to me to be irrelevant. The tower being a chattel which could not readily be replaced, equity, at the suit of the respondent, would grant specific performance and compel the delivery of the tower to "Marine".

In these circumstances it is my opinion that the respondent had an insurable interest in the tower at all relevant times.

It remains to mention the second ground on which Kelly J.A. would have allowed the appeal which is that even if the respondent did have an insurable interest in the tower that interest was not adequately described in the policy.

In my opinion in view of the way in which the trial proceeded this defence is not open to the appellants. At the trial Mr. Gray appeared for the respondent and Mr. Smiley for the appellants. At the commencement of the trial before any witness was called the record reads as follows:

HIS LORDSHIP: I thought from the pleadings that it indicated that it was construction of the policies, whether the loss fell within the policies or not.

MR SMILEY: My lord, I will concede this, that if they have an insurable interest, and I make a judicial admission, then they are entitled to recover to the extent of their interest. I don't deny that.

My sole defence is that the evidence—may I retract the word "sole"—my major defence, my lord, is that on the evidence and the facts as we know them the plaintiff did not have an insurable interest in this tower under the policies of insurance which were issued.

HIS LORDSHIP: Well then, with that statement, Mr. Gray, probably you should direct your evidence to establishing your insurable interest.

Later in the trial, while Mr. Gray was examining an officer of the company which had signed the policy as authorized representative of the insuring companies with the apparent purpose of establishing that all the circumstances were disclosed to him at the time the policy was applied for, Mr. Smiley made the following objection:

MR SMILEY: My lord, may I say that to this line of evidence I would take objection. There is no suggestion here that we were not bound to the extent of insurable interest. I suggest, with deference, that it is a collateral issue.

There is no doubt as to how McRuer C.J.H.C. understood these statements. In his reasons for judgment after setting out the facts he said:

> The case for the defendant is placed on the sole ground that on these facts the plaintiff had no insurable interest in the tower in question at the time the policy was written or at the time the tower was destroyed.

The words used by counsel for the appellants do not appear to me to be open to any construction other than that placed upon them by the learned Chief Justice. The issue to be tried was limited to the question whether the respondent had an insurable interest in the tower. If it had it was entitled to succeed, if it had not its action must fail.

Having reached the conclusion, for the reasons stated by McRuer C.J.H.C. and those briefly set out above, that the respondent had an insurable interest it follows that in my opinion the appeal fails.

I would dismiss the appeal with costs.

MARTLAND J.:—I agree with my brother Ritchie and also with the reasons delivered by Kelly J.A. in the Court of Appeal, whose conclusions are summarized in the following paragraph:

> In my opinion, the assured has not proven that it had any insurable interest of a nature which it purported to insure under the terms of the policy in question. I do not consider that it had any insurable interest whatsoever but even assuming that it had, the insurable interest which it had would have been that of a buyer to whom neither risk nor property had passed. If this gave ground for any insurance to be validly effected by the assured, it would have been for insurance on that interest and not on the property. Consequently, even if an interest did exist in Aqua-Land, it was not in such an interest as was insured under the policy in question.

In my opinion the appellants were not precluded from relying upon the alternative ground stated at the end of the quoted paragraph.

My brother Cartwright has quoted the statement made by counsel for the appellants at the commencement of the trial. Counsel then stated that his major defence was that "the plaintiff did not have an insurable interest in this tower *under the policies of insurance which were issued.*" I understand this to mean that it was contended that the respondent did not have any interest in the tower which was insurable under the terms of the policy of insurance which was in issue.

Very shortly after this statement was made by counsel, and still during the discussion between the Court and

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counsel before the evidence was commenced, the learned trial judge stated to counsel for the respondent:

> I think I can decide that, Mr. Gray. We will decide whether you have an insurable interest under the policy. I will have to decide if you have insurable interest and what the insurable interest is.

The objection taken by counsel for the appellants to the question being put by counsel for the respondent to Mr. Garfat, which is quoted by my brother Cartwright, was with respect to the following question:

> Now then, what is the standing of your firm as to power to bind the insurance companies?

Counsel for the appellants then said:

> My lord, may I say that to this line of evidence I would take objection. There is no suggestion here that we were not bound to the extent of insurable interest. I suggest, with deference, that it is a collateral issue.

The learned Chief Justice then said:

> The policy speaks for itself. You cannot vary the terms of the policy by oral evidence.

I would dispose of this appeal in the manner proposed by my brother Ritchie.

RITCHIE J.:—This is an appeal brought with leave of this Court from a judgment of the Court of Appeal of Ontario[1] (Kelly J.A. dissenting) affirming the judgment at trial rendered by McRuer C.J.H.C. whereby he ordered that the respondent should recover $7,500 from each of Canada Security Assurance Company and The Guarantee Company of North America, and $3,750 from each of the other appellants in respect of a claim for the destruction of a drilling tower made pursuant to the terms of a policy of insurance dated June 19, 1957, whereby the appellants bound themselves "severally but not jointly" to insure the respondent against "direct loss or damage", as provided in the policy, to property which was described as follows:

> On property of every description pertaining to the Assured's drilling operations on Structure No. 2, consisting principally but not limited to Casings, Pipe Equipment, Compressors, Hydraulic Jacks, Tools, Platforms, Binoculars, Cabins, Camp Supplies and Equipment, the property of the Assured or the Property of others for which the assured may be responsible, including personal effects of the Assured's employees with a limit of $500.00, subject to a limit of $100.00 per employee.

Although the total amount of the judgment appealed from was $30,000, the recovery against each appellant was for a sum less than $10,000 and the respondent moved to

[1] [1964] 2 O.R. 181, 44 D.L.R. (2d) 645.

quash the appeal invoking the provisions of s. 36(*a*) of the *Supreme Court Act* whereby the right to appeal to this Court is limited to judicial proceedings "where the amount or value of the matter in controversy in the appeal exceeds ten thousand dollars".

It has been settled since the case of *Glen Falls Insurance Company et al. v. Adams*[1] that when two or more insurance companies have been sued in one action on separate policies and seek to appeal to this Court, the appeal of each is a distinct and separate appeal in which the matter in controversy is its own liability and nothing else. In the present case, although there is only one policy, the liability is several and it was accordingly found to be necessary for the present appellants to apply for leave to appeal pursuant to the provisions of s. 41(1) of the *Supreme Court Act*. Upon consideration such leave was granted.

The respondent is a company which at all times material hereto was engaged in the business of drilling for oil and gas at Lake Erie where it carried on its activities from drilling platforms built from the surface of the ground to the surface of the lake, and for this purpose it had employed at least one conventional drilling tower constructed by Accurate Machine and Tool Company Limited (hereinafter referred to as "Accurate Machine").

In the month of September 1956, after the close of the drilling season, George Bodi, who was the president of Accurate Machine, and his associate, J. A. Bowland, approached James Paxton, who was the vice-president of the respondent company, and discussed with him the construction of a new type of drilling tower of which they had the plans and patent rights, and which they claimed would revolutionize drilling operations at Lake Erie. The respondent company was genuinely interested in this new design and after prolonged discussions, lasting from September 1956 until April 1957, an agreement was finally executed on April 29, 1957, between the respondent, Bodi and Bowland under the terms of which a new company, Marine Drilling Towers Limited (hereinafter referred to as "Marine Drilling") was to be incorporated for the purpose *(inter alia)* of taking delivery from Accurate Machine of a drilling tower

[1] (1916), 54 S.C.R. 88.

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of the new type which had already been partially constructed by that company.

It is common ground that the new tower was a part of the property described in the policy of insurance taken out by the respondent on June 19 and that it was destroyed while being towed into place on Lake Erie on July 25 before it had been delivered by Accurate Machine to Marine Drilling or to anyone else. The question to be determined on this appeal is whether at the time when the insurance was effected and at the time of its destruction, the respondent had an insurable interest in the tower so as to entitle it to recover for the loss under the terms of the policy.

At the outset of the proceedings at trial, the appellants' counsel, referring to the respondent as "they", made the following admission:

> My lord, I will concede this that if they have an insurable interest, and I make a judicial admission, then they are entitled to recover to the extent of their interest, I don't deny that.

The leading authorities defining the nature of an insurable interest have been referred to in the judgments in the Courts below and it appears to me that they are well summarized in MacGillivray on Insurance Law, 5th ed., at pp. 219 and 220, where it is said:

> Insurable interest in property is not confined to the absolute legal ownership. Generally, *any person who is so situated that he will suffer loss as the proximate result of damage to or destruction of the property has an insurable interest in it.* But *there must be some direct relationship to the property itself, for otherwise the interest is too remote and therefore not insurable.* In *Lucena v. Craufurd* [(1806), 2 Bos. & Pul. (N.R.) 269] Lord Eldon said, 'I am unable to point out what is an interest unless it be a right in the property or *a right derivable out of some contract about the property,*' and if we add to this, 'or some legal liability to make good the loss', we get a substantially accurate definition of insurable interest in property.

(The italics are my own.)

The nature of the insurable interest claimed by the respondent is described in para. 6 of the statement of claim as follows:

> On or about the 29th day of April, 1957 the plaintiff agreed to participate jointly with George Bodi and J. A. Bowland to patent and to complete the construction of a type of marine drilling tower, known as a Mark V Tower and on or about the 10th day of May, 1957 the plaintiff, pursuant to arrangements with the said Bodi and the said Bowland, advanced to Accurate Machine & Tool Company Limited, the fabricator of the said Tower, the sum of $30,000.00 toward the cost of fabrication thereof.

The character of the claim is also apparent from the terms of the revised proof of loss which reads:

> ...the drilling platform referred to...was at the time of the loss owned by Accurate Machine & Tool Company Ltd. but the assured had an insurable interest *by reason of its monetary interest in platform;...*

(The italics are my own.)

The monetary interest referred to is a cheque for $30,000 given by the respondent to Accurate Machine on May 10, 1957, under circumstances which will be hereinafter described and it was this advance to which the respondent's vice-president referred when he said in the course of his examination-in-chief:

> We were insuring the interest of Aqua-Land which was indicated by the monies that had been advanced and by the exhibits here.

The learned trial judge and the majority of the Court of Appeal found that the respondent had an insurable interest in the tower in question consisting of "a right derivable out of some contract about the property", and Mr. Justice Schroeder expressly found that:

> In the present case the plaintiff was a purchaser of the property insured who had advanced more than three-fourths of the builder's stipulated consideration.

The kind of contractual right which is recognized at law as creating an insurable interest was discussed in the case of *Clark v. Scottish Imperial Insurance Company*[1] where this Court considered a claim made under an insurance policy taken out by one Clark on a vessel being built by a shipbuilder named Bishop with whom Clark had an arrangement that if he (Clark) would make the necessary advances to enable the vessel to be built, he would be in a position to look to the vessel when completed as security for his advances. The advances were therefore made on the security of the vessel and on the faith of the agreement between the parties. On completion the vessel was to be delivered to Clark for sale and he was to be recompensed out of the proceeds. The vessel was destroyed by fire when only partially built.

In the course of delivering the judgment of the majority of the Court, which held that Clark had an insurable interest, Ritchie C.J. said:

> The contract of insurance being a contract of indemnity, it is abundantly clear that the plaintiff must establish some interest in the subject-matter insured.

[1] (1879), 4 S.C.R. 192.

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The questions we have to determine are, what constitutes such an insurable interest? And did the verbal agreement and the advances made on the strength of it, confer on *Clark* an insurable interest in the vessel while in course of construction?

As to the first, it is easily answered, negatively, that an insurable interest is not confined to a strict legal right of property; and, affirmatively, that any interest which would be recognized by a Court of Law or Equity is an insurable interest, or, as Mr. *Bunyon* thus sums up the question (Bunyon on Fire Insurance p. 8) 'that any legal or equitable estate or right which may be prejudicially affected, or any responsibility which may be brought into operation by a fire will confer an insurable interest.' There must therefore be a valid subsisting contract, susceptible of being enforced between the parties themselves, in order to constitute an insurable interest, or right of action against the insurer, not a mere expectancy or probable interest, however well founded. Was there, then, in this case such an existing contract between *Clark* and *Bishop*, in respect to this vessel in course of construction, as conferred on *Clark* an interest in it binding in law or equity, which a Court of Law or Equity would recognize and enforce, and which interest was prejudicially affected by the fire?

In conformity with this decision it appears to me that the question to be answered is whether there was such an existing contract between the respondent and Accurate Machine in respect to the tower under construction as conferred on the respondent an interest in it which a court of law or equity would recognize and enforce.

In the course of being questioned as to the negotiations between the respondent, Bodi (the president of Accurate Machine) and Bowland, during the months preceding the signing of the agreement, the attention of Mr. Paxton, the respondent's vice-president, was drawn to the April 29th agreement and he was asked:

Q. Do I take it that this agreement after these extensive negotiations that you refer to, the agreement that you arrived at, was intended to be expressed in this document?

A. Yes.

At a later stage, Mr. Paxton was asked:

Q. It has been stated that Aqua-Land instructed the building of the tower. Did you have anything to do with the instructions given by Aqua-Land to build the tower?

A. I do not recall them as instructions from Aqua-Land. I don't recall them as being specific instructions. It was by agreement where we would meet and say all right we are going to construct the thing but I have no recollection of any specific instructions having been given by Aqua-Land.

Q. Does this mean the instructions were given by the group, rather than—

A. That's right. It was an agreement by the partners, Aqua-Land, Bodi and Mr. Bowland.

The only agreement between Aqua-Land, Bodi and Bowland in respect to the tower of which there is any direct evidence is that expressed in the agreement of April 29, 1957, and I adopt the view expressed by Kelly J.A. in the course of his dissenting opinion in the Court of Appeal where he said:

> The decision to proceed by the incorporation of Marine and the careful spelling out of the relationship to Marine of each of the parties to the agreement of 29th April, 1957, is a denial of the existence of any obligation to each other or to any one else save what has been written into the agreement. Consequently, I infer that no such legal relationship existed prior to 29th April, 1957, and thereafter the relationship was solely that to be found in the agreement.

By that agreement Bodi and Bowland each agreed to subscribe for 250 common shares of the capital stock of Marine Drilling while the respondent was to subscribe for 500 such shares. It was further provided that the respondent was to subscribe for 39,200 preference shares of a par value of $1 each which were to be paid for "forthwith after the incorporation of Marine Drilling". Bodi and Bowland on their part agreed that they would each transfer to Marine "all (their) right, title and interest in and to the plans and patent rights of the Mark V tower and the said invention and any improvements thereto" and in return they were each to receive 19,600 preference shares. Clause 5(6) of the agreement provides as follows:

> The parties hereto agree that forthwith after the incorporation of Marine Drilling they shall ensure that Marine Drilling shall enter into an agreement with Accurate Machine & Tool Company Limited under which the latter shall forthwith construct a Mark V Tower in accordance with the specifications set out in Schedule 'A' hereto and deliver the same to Marine Drilling to be its absolute property for and in consideration of the payment, on such delivery, by Marine Drilling to Accurate Machine and Tool Company Limited of the sum of $39,200.

The agreement contains no reference to delivery of the tower to Aqua-Land by Accurate Machine, nor is there any provision for payment by the respondent. It is true that when the insurance was effected and at the time of the loss Marine Drilling had not exercised any of its corporate powers but it was in existence as a separate legal entity and it was the company which was to pay the purchase price and to which the tower was, on completion, to be delivered as its absolute property.

It remains to consider the circumstances under which the sum of $30,000 was advanced to Accurate Machine on

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May 10. There is no doubt that on that day the respondent issued a cheque for the amount in question bearing the notation "Re Loan to Marine Equipment", the stub of which was endorsed: "Accurate Machine advance $30,000".

The position at that time was that the construction of the tower was well advanced and that it was to be delivered to Marine Drilling and paid for by that company which had at that time been incorporated but was not yet in business and had no funds with which to pay for it. The respondent had agreed to pay $39,200 for 39,200 shares of Marine Drilling which had not yet been issued to it, and it appears to me to be clear from the respondent's own evidence that the advance of $30,000 to Accurate Machine was made on behalf of Marine Drilling to be credited by that company against the respondent's obligation to pay for its shares. This is borne out by the evidence of the respondent's secretary, Mr. Gerald Kirby, who said:

> Q. If that is so, then at the time you advanced the money, and you showed "Re Loan to Marine Drilling", the money was advanced by way of an advance on your obligation to buy shares in Marine Drilling?
>
> A. Yes.
>
> Q. And that is why you showed "Re Loan to Marine Drilling", because you hadn't purchased the share certificates at the time you issued the cheque?
>
> A. Actually Aqua-Land should never have issued a cheque to Accurate Machine & Tool.
>
> Q. Nevertheless you did. We are trying to find out Aqua-Land's interest in this matter; that is what we are aiming at. That is perhaps the bone of contention, I guess, among all of us. But if I follow you then, the cheque was written by way of an advance or a credit against your obligation to buy shares in Marine Drilling?
>
> A. Yes.
>
> Q. But instead of being sent to Marine Drilling or put in Marine Drilling's bank account, for it to be opened and a new one issued to Accurate Machine, you sent the cheque directly to Accurate Machine?
>
> A. That is correct.

On the same subject the respondent's vice-president, Mr. Paxton, stated:

> Q. Mr. Bodi has said that the $30,000 that was paid by Aqua-Land to Accurate was a progress payment on the tower?
>
> A. That is true.
>
> Q. Made by Aqua-Land?
>
> A. Made by Aqua-Land on behalf of Marine Drilling Towers in the future.

HIS LORDSHIP: Q. Well, Marine Drilling Towers was in existence at that time?

A. Just the charter, that is all, sir.

Q. Well, it was in existence?

A. That's right.

MR. GRAY: Q. Mr. Bodi has said that Aqua-Land still owes Accurate $9,200 on the construction of the tower?

A. That is true.

HIS LORDSHIP: Q. Is that strictly accurate?

A. On the fulfillment of the delivery of the tower and the completion of the terms of the agreement, my lord.

Q. *Would it not be that Marine Drilling owed $9,200 and Aqua-Land would owe Marine Drilling that amount on the balance of their subscription for stock?*

A. *All right; yes, my lord.*

(The italics are my own.)

For some months after it was made, the advance of $30,000 was carried on the respondent's books as a loan to Accurate Machine and there was some discussion of taking legal action to recover it.

It appears to me to be pertinent to note that Accurate Machine had insured the tower with its own insurers and in due course filed a proof of loss which stated that:

It (the tower) was at the time of the accident owned outright by Accurate Machine and Tool Company Limited free of any lien or encumbrance.

Pursuant to this claim a settlement was reached by Accurate Machine with its insurers based on the total cost to it of the building of the tower.

I agree with Kelly J.A. that what the respondent is now seeking from its insurers "is the recoupment of the loss which it sustained when it did not receive back the $30,000 for which a cheque had been given to Accurate Machine".

It is clear from the decision of the House of Lords in *Macaura v. Northern Assurance Company Limited and Others*[1], that a loan which is not secured by a lien or charge on the insured property does not give rise to an insurable interest therein and even if the $30,000 received by Accurate Machine were to be treated as a loan made by the respondent on its own behalf, it was in no way secured by any lien or charge on the tower. It is equally plain that the respondent's position as one entitled to become a shareholder of Marine Drilling could not give it an insurable interest in

[1] [1925] A.C. 619.

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property in which that company was interested. It is contended, however, that the advance of $30,000 was made by the respondent by way of part performance of a contract to purchase the tower and, as I have indicated, the majority of the Court of Appeal appear to agree with this contention.

With the greatest respect for those who hold a different view, the conclusion that the respondent was the purchaser of the tower appears to me to leave out of account the reality of the position assigned to Marine Drilling under the terms of the agreement of April 29. It was clearly contemplated by that agreement that Marine Drilling was to be the purchaser of the tower and it was upon this basis that the respondent agreed to become interested in the matter at all.

Marine Drilling was in fact incorporated, as the respondent's president has said:

> . . . for the purpose of owning and possessing not only the tower that was under construction, but other towers that were to be developed and would be manufactured, fabricated and would function as a company for the purpose of making available to the operators in Lake Erie this type of tower for the purpose of drilling for gas.

It was a term of the agreement of April 29 that "Forthwith after the issue of the common and preference shares", the original parties to the agreement would transfer 15,680 preference and 200 common shares to G. R. Johnson of Radar Exploration Co. who was to become a director and it is otherwise apparent that it was contemplated by all concerned that Marine Drilling would operate on a large scale as a distributor of the new towers to all those engaged in drilling for oil in Lake Erie.

The fact that at the time of the loss Marine Drilling had not issued any shares except to its incorporators and had not otherwise engaged in corporate business does not, as I have said, detract from its existence as a separate legal entity, and the fact that the respondent was to become one of its substantial shareholders and with Bodi and Bowland was to ensure that it agreed to take delivery of the tower and pay for it, does not, in my view, serve to identify the respondent with Marine Drilling under the contract so as to cast it in the role of a purchaser of the insured property.

The full implications of the view adopted by Mr. Justice Schroeder become apparent from the penultimate paragraph of his reasons for judgment where he said:

> . . . had the loss not occurred and had the Mark V tower been completed as contemplated by the agreement, and had Accurate Machine and Tool

Company Limited then attempted to divert it to alien purposes to the detriment of the plaintiff's claim, a *Court of equity* would have interposed at the plaintiff's instance and *would have compelled Accurate Machine and Tool Company Limited to carry out its side of the agreement upon payment or tender of the balance of $9,200.00, by placing the tower in the hands of the plaintiff and its associates in the venture.* Manifestly, it would be fraudulent for Accurate Machine and Tool Company Limited to refuse to perform its obligation under the agreement *after such substantial part performance on the plaintiff's part, having special regard to the fact that its design was the subject of a patent in which the plaintiff held an interest.*

(The italics are my own.)

With the greatest respect, as I have indicated, I take the view that the obligation of Accurate Machine upon payment of the agreed purchase price for the tower was not to place it "in the hands of the plaintiff and its associates in the venture", but was to deliver it to Marine Drilling, and it appears to me also that the respondent held no interest in the patent for the tower design except in its capacity as a potential shareholder of Marine Drilling. It will appear also from what I have said that I do not consider the advance of May 10 to have been made in part performance of any contractual obligation of the respondent to Accurate Machine.

In the Courts below significance was attached to the fact that the plaintiff had placed its tools on the platform of the tower under some arrangement which was not developed in the evidence. Although this may be some evidence that the respondent intended to make use of the tower, I do not consider it to be in itself in any way decisive of the question of whether or not the respondent had an insurable interest in the insured property.

In view of all the above, it will be seen that I am not satisfied that there existed, either at the time when the insurance was applied for or at the time of the loss such a contract between the respondent and Accurate Machine in respect of the tower under construction as conferred on the respondent an interest in it which a court of law or equity would recognize and enforce. I am accordingly of opinion that the respondent has failed to discharge the burden of showing that it had an insurable interest in the property insured. In this regard I also adopt the reasoning contained in the dissenting opinion of Kelly J.A. in the Court of Appeal.

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I would allow this appeal and direct that the judgment of the Court of Appeal and of the learned trial judge be set aside.

The appellants will have their costs in this Court and in the Courts below.

SPENCE J.:—I have had the privilege of reading the reasons of my brothers Cartwright and Ritchie. With respect I concur with the view of the former, that the defence that the interest of the respondent was not adequately described in the policy, was not open to the appellants and I have nothing to add to what has been said by Mr. Justice Cartwright thereon.

However, I concur with the opinion of Mr. Justice Ritchie that the respondent has failed to discharge the burden of showing that it had an insurable interest in the property insured. Since Mr. Justice Ritchie has reviewed the facts in detail and quoted excerpts from the evidence which I find relevant, I shall not repeat them. It would seem that as of April 29, 1957, the whole agreement between Aqua-Land, Bodi and Bowland was contained in that document. As Mr. Justice Ritchie has pointed out, that agreement in clause 5(6) provides:

> The parties hereto agree that forthwith after the incorporation of Marine Drilling they shall ensure that Marine Drilling shall enter into an agreement with Accurate Machine & Tool Company Limited under which the latter shall forthwith construct a Mark V Tower in accordance with the specifications set out in Schedule 'A' hereto and deliver the same to Marine Drilling to be its absolute property for and in consideration of the payment, on such delivery, by Marine Drilling to Accurate Machine and Tool Company Limited of the sum of $39,200.

What occurred thereafter? Mr. Paxton in his evidence, quoted by Mr. Justice Ritchie in his reasons, testified that no formal instructions were given thereafter as to the completion of the tower but that the parties, *i.e.*, Aqua-Land and Bodi and Bowland, would meet and say "All right we are going to construct the thing" and further agreed that instructions were given by this group. In my view, that conduct did not constitute an order of purchase by Aqua-Land any more than it did by Bodi or Bowland. It was simply a carrying out of the agreement contained in the said clause 5(6) of the agreement of April 29, 1957. The three were seeing that Accurate Machine & Tool Company Limited should "forthwith construct a Mark V Tower" and

were doing so on behalf of Marine Drilling Towers Limited. The same three, in accordance with clause 1 of the said agreement of April 29, 1957, had caused Marine Drilling Towers Limited to be incorporated and that corporation was therefore a legal entity with the powers granted by the charter at the time. To order the completion of the tower on behalf of Marine Drilling was merely the carrying out of the next and most important duty of the three parties to the agreement. It is true that no formal order in the name of Marine Drilling Towers Limited was ever given in writing nor was any by-law or even resolution ever enacted, but the three persons who had the sole control of that company acted in concert to see that this next and most important step of the company was taken in accordance with the agreement. It must be remembered that the regrettable failure to employ the usual corporate procedures would not have concerned Accurate Machine & Tool Company Limited. That company was controlled completely by Messrs. Bodi and Bowland who were parties to the agreement of April 29, 1957, and who would recognize that the "go-ahead order", no matter how informal, was the carrying out of clause 5(6) of that agreement and that in fact Marine Drilling, out of the mouths of those who had incorporated it and who alone controlled it, was ordering the completion of the tower.

Then when the payment of the $30,000 to Accurate Machine & Tool Company Limited is considered, we see an exact confirmation of this view of what occurred. A consideration of the evidence given by Mr. Paxton, the vice-president of Aqua-Land and Mr. Kirby its secretary, surely demonstrates that the cheque for that amount made out by Aqua-Land in favour of Accurate Machine & Tool Company Limited and delivered to the latter was simply a method of paying to the latter company of part of the price which, by the agreement of April 29, 1957, Marine Drilling was to pay for the construction of the tower. Aqua-Land, under the terms of that agreement, was to subscribe $39,200 for preference stock in Marine Drilling. By this cheque for $30,000, Aqua-Land was paying, or pre-paying, that much of its subscription. The balance of $9,200 was still owing on its subscription for shares in Marine Drilling and after such payment and the completion and delivery of the tower,

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Marine Drilling still owed $9,200 to Accurate Machine & Tool Company Limited. Again the proper method would have been to have Aqua-Land draw its cheque for $30,000 in favour of Marine Drilling and then Marine Drilling deliver its cheque for that amount to Accurate Machine & Tool Company Limited. However, Marine Drilling had only provisional directors and no bank account so the informal means were employed but the essential character of the payment was not altered.

This view of the circumstances would result in the respondent's only interest in the tower being that of a shareholder in Marine Drilling, or an investor entitled to have issued to it shares for which it has paid in part such payment having been used in part payment for the completion of the tower. It would appear upon the authorities analyzed by Mr. Justice Ritchie that such a result would not give to the respondent the direct relationship to the property in the tower to constitute an insurable interest.

Therefore, I would allow this appeal, set aside the judgment at trial and upon appeal to the Court of Appeal for Ontario and dismiss the action. The appellants will have their costs throughout.

Appeal allowed with costs, CARTWRIGHT *and* JUDSON JJ. *dissenting.*

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